

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Improving Public Safety	)	WT Docket 02-55
Communications in the 800 MHz Band	)	(FCC 04-253)

**COMMENTS OF THE PUBLIC SAFETY  
IMPROVEMENT COALITION**

The Public Safety Improvement Coalition (“PSIC”), a group of local jurisdictions with 800 MHz public safety radio systems, hereby responds to the Commission’s invitation to comment<sup>1</sup> on certain *ex parte* presentations by Nextel following the Report and Order (“Order”) released August 6, 2004 in the captioned proceeding.<sup>2</sup> While seeking to expedite comment, the Public Notice also recognized that this added pleading cycle might create uncertainty for Nextel and other 800 MHz licensees. The FCC therefore extended by 45 days certain deadlines in the Order, as modified subsequently by three Errata.<sup>3</sup>

Twelve original members of PSIC filed comments and reply comments early in this proceeding, and several members submitted supplemental or additional views. All but one of the jurisdictions<sup>4</sup> joining today’s comments were part of the original coalition. The PSIC applauds

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<sup>1</sup> Public Notice, FCC 04-253, released October 22, 2004. A single round of comments within 10 days was triggered by the publication of the Notice in the Federal Register of November 22, 2004, 69 Fed. Reg. 67880.

<sup>2</sup> FCC 04-168, 19 FCC Rcd 14,969 (2004).

<sup>3</sup> Third Erratum, DA 04-3459, released October 29, 2004; Second Erratum, DA 04-3208, released October 6, 2004; and Erratum, released September 10, 2004.

<sup>4</sup> Anne Arundel County, Maryland; Charles County, Maryland; District of Columbia, Office of the Chief Technology Officer (“OCTO”); City of Philadelphia, Pennsylvania; and City of Tucson, Arizona.

the diligent efforts of the Commission and FCC staff, together with all of the private and public safety contributors to the Order, for manifestly improving public safety communications in the 800 MHz band.

As the Notice points out, Nextel has raised a number of issues since the release of the Order in early August. Some of these amount to relatively insubstantial clarifications, but others go to the substance of the rulemaking decision and must be challenged. PSIC is particularly concerned with those questions relating to the content and timing of new interference control measures. We are equally concerned that language addressing the eligibility of expenses for reimbursement, and the timing of such payments, be clarified to establish unequivocally the right of public safety agencies to reimbursement for planning and administering system relocation, as well as the costs of buying and installing equipment.

One of the PSIC joint commenters is from the Mexican border area and seeks reassurance that band-clearing in that region of shared spectrum will address its special needs. PSIC's interest in the relative values of spectrum to be given up or acquired by Nextel is less direct and will be touched only briefly.

#### **I. Interference Abatement Measures Must Take Effect Immediately.**

Nextel misreads the Order when it asks the Commission to "clarify" that new rules and standards for abatement of interference to public safety radio systems may be deferred until 800 MHz band reconfiguration is completed in three years or more.<sup>5</sup> For the FCC to adopt anything like the transition standards proposed by Nextel would be directly contrary to the Order, and no mere clarification:

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<sup>5</sup> Letter, with attachment, "Transition Period Interference Protection Standard," to FCC Secretary from Lawrence R. Krevor, September 28, 2004 ("Krevor Letter"). *See also*, Letter to FCC Secretary from Regina M. Keeney, September 16, 2004, at 3.

The Consensus Parties recommended that the proposed procedures for defining unacceptable interference and establishing licensees' entitlement to be protected against such interference should not be put into place until reconfiguration of the 800 MHz band has been completed. We disagree. (Order, ¶102)

Nextel's error proceeds from the mistaken premise that the protection thresholds specified in the Order were "based on technical assumptions and solutions proposed by the Consensus Parties" that are achievable only after band realignment is completed. (Attachment, Krevor Letter, 1) To the contrary, the Commission performed its own analysis (Order, ¶107) and concluded the opposite on the timing of implementation:

In short, we cannot afford the luxury of awaiting completion of band reconfiguration—and putting critical public safety communications at continued significant risk in the interim—before we determine the conditions under which licensees are entitled to interference protection. Accordingly, our rules for interference protection entitlement and the assignment of responsibility for the abatement of unacceptable interference will become effective sixty days after publication of this *Report and Order* in the Federal Register.<sup>6</sup>

This is a fair result. Some public safety licensees that do not meet the entitlement signal levels at this time will be ineligible for full mitigation assistance,<sup>7</sup> even though the interference they are experiencing from Nextel and other carriers could be remedied by relocation or retuning.

Both these licensees and licensees who encounter unacceptable interference after relocation are entitled to immediate protection, and that can only happen if the Commission's rules become effective on the schedule the Commission adopted in the Order. It must be remembered that public safety licensees are using the spectrum for critical emergency

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<sup>6</sup> Order, ¶102. *See also*, Order ¶128: "We believe it prudent to codify this previously voluntary [abatement] effort into strict responsibility. . . . Accordingly, as of the effective date of this [Order], ESMR and cellular carriers are strictly responsible for abating unacceptable interference," at their own expense.

<sup>7</sup> Carriers are obliged to respond to complaints even from low-signal public safety systems, but resolution of the complaints is not mandatory. (Order, ¶105)

communications. The risks of interference to first responders is immediate. The Commission's interference rules should not be watered down or postponed until completion of a years-long relocation process.

Of course, effective abatement is not only about responding to complaints after the discovery of unacceptable interference:

To facilitate system designs that take the relevant interference environment into account, we are adopting rules that require mutual prior notification, on request, of changes or additions to ESMR, cellular telephone, public safety and CII 800 MHz systems; and are encouraging other voluntary and cooperative interference abatement solutions, such as "channel swaps."

(Order, ¶115, referring also to ¶¶124-27) This kind of prior coordination on both sides must begin immediately, in step with application of the new interference standards. Rather than prescribe in detail the substance of required abatement, the Order leaves specific technical remedies to the interfering carriers to determine, in consultation with the affected public safety systems.<sup>8</sup> The tradeoff for this remedial flexibility granted to the carriers, however, must be their strict accountability for abatement<sup>9</sup> and strict timetables for responding to complaints or other evidence of unacceptable interference. PSIC believes the Commission is right to require that its interference rules take effect promptly and urges the Commission to reject Nextel's contrary proposal. (Order, ¶131)

## **II. If Nextel Gets Base Station Reconfiguration Credit, So Should Public Safety.**

In its ex parte communication of September 16, 2004 (note 5, *supra*), Nextel proposes the following clarification:

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<sup>8</sup> Order, ¶129, including note 362: Remedial measures "could include responsibility for furnishing affected non-cellular systems with additional base stations or more interference-resistant mobile and portable radios."

<sup>9</sup> Including the "safety valve" of carrier site shutdown "when the continued presence of interference constitutes a clear and imminent danger to life and property." (Order, ¶140)

Nextel will receive credit in the financial reconciliation process described in paragraphs 329-330 of the [Order] for the costs it incurs in adding base stations necessary to maintain its existing network capacity during the band reconfiguration transition process.

Simple fairness requires that if Nextel is given this substantial benefit, then public safety agencies should receive the same level of support. PSIC therefore requests clarification that the “comparable facilities” to which public safety systems must be relocated may require additional base stations and that, if so, the cost will be covered by Nextel as part of its reimbursement for relocation expenses. The requested clarification is necessary for the following reasons.

The Order defines comparable facilities at ¶201 (footnotes 526-32 omitted):

All relocating licensees shall be relocated to comparable facilities. Comparable facilities are those that will provide the same level of service as the incumbent’s existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. If the reconfiguration of a licensee will entail a significant interruption of service during the relocation process, Nextel will fund the installation of a redundant system.

At first reading, one might assume that equivalent signaling capability and coextensive geographic coverage necessarily imply the potential need for additional base stations in a relocated public safety system. However, the required equivalence of “operating costs” and the presence of footnote 531 combine to raise the question whether the Order will be uniformly interpreted to allow new base station costs incurred by public safety licensees.

The footnote reads: “In this regard, we observe that our definition of comparable facilities is limited to *already existing facilities*.” (emphasis added) Moreover, the placement of the footnote leaves unclear whether it modifies just the final sentence of the bulleted paragraph – concerning redundant transitional systems -- or the entire paragraph.

Looking back to footnote 362 of the Order (note 8, *supra*), the Commission plainly intends that additional base stations be a potential remedy for unacceptable interference. In order to realize that intent, with which we certainly agree, comparable-facilities relocation should include additional base stations, particularly if “acceptance testing” of a relocated public safety facility indicated continuing unacceptable interference. Where adding base stations is a cure, it only makes sense to install them as part of the relocation rather than waiting for the unacceptable interference to degrade the relocated systems and spawn *post hoc* complaints. Given the fiscal limitations of public safety agencies, this very practical way of proceeding is possible only if the cost of adding necessary base stations is included in comparable-facilities relocation.

### **III. The Order Is Sufficiently Clear on the Negotiating Process.**

In its September 16<sup>th</sup> ex parte letter, Nextel is overly concerned to clarify points that seem clear enough as originally written and do not require the requested gloss. Bulleted below are the points Nextel identifies as requiring clarification, followed by the existing and obviously quite clear language from the Order speaking to these points:

- **Direct negotiations between Nextel and incumbent licensees, leading to written agreements.**

Order, ¶201, voluntary period: “Nextel and relocating incumbents may agree to conduct face-to-face negotiations or either party may elect to communicate with the other party through the Transition Administrator.”

Mandatory period: “Again, the parties may agree to conduct face-to-face negotiations or elect to communicate through the Transition Administrator.”

- **Either party may request that the Transition Administrator act as a negotiating intermediary.**

Order: See language from ¶201 above.

- **A licensee’s rejection of Nextel offers or refusal to engage in discussions with Nextel should be taken as bad faith.**

Order, ¶201: “All parties are charged with the obligation of utmost good faith in the negotiation process.<sup>10</sup> If any licensee fails to negotiate in good faith, its facilities may be involuntarily relocated and its license modified accordingly by the Commission.”

Unless Nextel can explain further why these clarifications are needed, we recommend the Commission not change the language of the Order. We anticipate that additional refinements in the negotiating process, if needed, will be identified as a result of the practical experience gained in the initial relocations.

Nextel’s final bullet is particularly troublesome. For a public safety entity simply to decline a Nextel offer -- which may be for good and sufficient reason under terms of the Order -- should never by itself be taken as evidence of “bad faith.” Here, as with the other “clarifications” sought, the language of the Order is clear and explicit. As pointed out in note 10, the Commission fully articulates the factors relevant to determining good faith in particular. Nextel’s proposals will either add ambiguity where there is none or, as in the case of the final bullet, alter the terms of the Order.

One area, however, requires additional explication in order to fully protect public safety agencies from having to pay costs that are obviously necessary for relocation. At ¶198 of the Order, following submission, review and approval of a licensee’s estimates of cost of relocation, funds are to be disbursed “to the entity(ies) contracted to reconfigure the system.” Thus, the

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<sup>10</sup> The Order elaborates at note 524: “Among the factors relevant to a good-faith determination are: (1) whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party. See Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825, 8837-8838 ¶ 21.”

money for the work is to be paid in advance to, e.g. “the licensee, a local contractor and an equipment manufacturer.”

We believe this language covers the fees of the contractors and consultants necessary for system planning and administering the relocation process, as distinct from providing or installing physical equipment . No public safety agency can relocate without incurring these costs, and the costs can be substantial. For many jurisdictions, reimbursement may be a condition of completing the relocation in the prescribed time. We ask the Commission to confirm our understanding that such costs will be reimbursed.<sup>11</sup>

#### **IV. PSIC Supports Cost-Effective, Accountable Operations Under the Letter of Credit.**

In its October 1, 2004 ex parte communication, among other recent submissions, Nextel explains why “having the LOC [Letter of Credit] Trustee make frequent and recurring draws” to cover individual licensee relocation expenses may be less effective and efficient than “allowing Nextel to pay 800 MHz incumbent relocation costs directly.”<sup>12</sup> PSIC members want to be paid in advance for their approved expenses as quickly as possible. Nextel’s suggestion appears to be sensible so long as it remains accountable. Money saved on fees is money available to pay licensee expenses.

We are not persuaded, however, by Nextel’s argument for a change in one of the terms in the tripartite agreement among Nextel, the Transition Administrator and the LOC Trustee (Order, Appendix E, Annex E). Nextel contends that its forfeiture of the balance of the LOC Trust -- in the event of failure to make payments as specified -- “shall not exceed the amount owed to the United States Treasury by Nextel.” We see no basis in the existing language of the Order for

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<sup>11</sup> *See also*, the statement of another PSIC member, D.C. OCTO, at Attachment A.

<sup>12</sup> Letter to FCC Secretary from Regina M. Keeney, 1.



Nextel to fear that the forfeiture of the Trust would be for any other purpose than covering the exact amount of Nextel's debt. So the desired amendment seems unnecessary.

On the other hand, our border area members are concerned that any reconciliation of debt at the conclusion of the heartland re-banding make allowance for a more protracted resolution of U.S.-Mexico channel assignments.<sup>13</sup> Of course, the Order (§176, note 471) obliges Nextel to assure funding for U.S. border licensee relocations, even if they lag the heartland. Before any balance left in the Trust is returned to Nextel, PSIC would want to make sure that the existing LOC is extended or a separate LOC is funded adequately.

In this connection, we ask for a fuller explanation of the meaning of footnote 471's reference to "a sum of money equal to that which would have been incurred had the Commission band plan been implemented along the borders without regard to international agreements." We believe that U.S. licensees on the Mexican and Canadian borders are entitled to "comparable facilities" that take account of treaty renegotiation, and the Letter of Credit must be funded accordingly.

Respectfully submitted,  
PUBLIC SAFETY  
IMPROVEMENT COALITION

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ITS ATTORNEY

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<sup>13</sup> Several border members of PSIC have expressed informally to FCC staff their interest in commenting to the Commission and its Mexican and Canadian counterparts about proposed solutions for re-banding in the areas where spectrum is shared between countries. We would like to participate in the negotiation process in some helpful way, and we look forward to an invitation.

**OCTO Statement in Support of Clarification  
on Reimbursement of Certain Planning Expenses**

OCTO is seeking clarification on the specific types of rebanding support services, both delivered internally and hired externally by the affected jurisdictions, that are covered and funded by Nextel on this program. The Order does not detail this information and OCTO believes that further clarification will advance the overall program objectives established by the FCC in the Order. There are significant “reasonable” administrative considerations and efforts required to sustain this program. We believe this support to be clearly within the guidelines and cost reimbursement criteria established to achieve a successful and timely 800 MHz rebanding program. The burden of paying these program administration costs, similar in nature and purpose and just as critical to the hard technical and engineering cost associated with the program, should be fully funded and not unreasonably capped.

OCTO additionally recommends that the Order include or, at a minimum, that the Transition Administrator (TA) be directed and authorized to provide, “advanced payments” to affected governmental entities to facilitate support to the numerous activities associated with planning and preparation for the 800 MHz transition. Government procurement and budgetary appropriations are clear in that no services and/or new products can be delivered or purchased unless required funding has been appropriated.

The extensive and immediate work required to advance the aggressive transition schedule is beyond current budgetary considerations and will best be served if advanced payments are provided to facilitate the planning and preparation work on the program. Affected jurisdictions will be unable to internally fund this work due to the aforementioned budgetary and appropriations limitations and restrictions. Advanced funding will expedite the program and effectively reduce the overall time to implement and complete since it will provide governments with essential funds to immediately begin work.

Finally, OCTO encourages the FCC to extend program funding to the Regional Planning Committees (RPC) to cover the work they undertake in planning, coordinating and executing the relocation of the NPSPAC channels in their affected regions. This effort is essential to the success of the program and the governments that pay the salaries of their RPC representatives should not be burdened with paying the expenses of their RPC support staff.

These OCTO comments and recommendations are further detailed in separate comments filed by OCTO in this proceeding.